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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-746

J. W. HARGROVE,
Plaintiff-Appellant,

vs.

W. L. NEWSOM, et al.,
Defendants-Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION OF APPELLEES TO DISMISS APPEAL

JOHN K. MADDIN, JR.
GRACEY, BUCK, MADDIN & COWAN
500 Court Square Building
300 James Robertson Parkway
Nashville, Tennessee 37201
Attorneys for Defendant-Appellee, Kelley Co., Inc.

JAMES C. SUMMERS
HOWSER, THOMAS, SUMMERS & BINKLEY
300 Court Square Building
300 James Robertson Parkway
Nashville, Tennessee 37201
Attorneys for Defendant-Appellee, W. L. Newsom

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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MOTION OF APPELLEES TO DISMISS APPEAL

Appellees move that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question. This is an appeal from a decision of the Supreme Court of Tennessee rejecting Appellant's contention that **Tennessee Code Annotated** 28-304, as it existed prior to its amendment in 1969, denied to the Plaintiff equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Tennessee Code Annotated 28-304, as it existed prior to its amendment on May 20, 1969, stated as follows:

> "**28-304. Personal tort actions—Malpractice of attorneys—statutory penalties.**—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, and statutory penalties shall be commenced within one (1) year after cause of action accrued."

The Supreme Court of the State of Tennessee has consistently ruled that the cited statute is applicable to all actions in tort for injuries to the person, including those counts of a products liability type lawsuit which are based on tort law (as distinguished from the law of express or implied warranties). The Supreme Court of Tennessee has also ruled, in a consistent line of cases dating back at least to 1934, that where the tortious conduct complained of is not contemporaneous with the injuries received, the cause of action "accrues" on the date of the tortious conduct. **Albert v. Sherman**, 167 Tenn. 133, 67 S.W.2d 140 (1934). In **Jackson v. General Motors Corporation**, 223 Tenn. 12, 441 S.W.2d 482, Cert. denied, 396 U.S. 942 (1969), the Supreme Court of Tennessee specifically held that in a products liability situation, the cause of action accrues at the time of the sale of the product, not at the time of the injury.

When the Plaintiff, Hargrove, brought this products liability suit in the Circuit Court for Davidson County, Tennessee on September 20, 1969, based in part on tort counts which accrued in July of 1967, the Defendants demurred to the tort counts on the basis of the Statute of Limitations, **T.C.A.** 28-304. The Trial Court sustained the

Defendants' demurrers, and the Supreme Court of Tennessee affirmed. **Hargrove v. Newsome**, ... Tenn. ..., 470 S.W.2d 348 (1971).

As the Defendants understand the Plaintiff's constitutional arguments, the Plaintiff-Appellant is asserting that the statute, **Tennessee Code Annotated** 28-304, as interpreted before its amendment in 1969, violated the equal protection clause because:

> "Under **Jackson**, the class of Plaintiffs who is dealing with the product manage not to be injured until the product is one year old, is completely barred from access to the Courts. On the other hand, those Plaintiffs who do not avoid injury for such a period are allowed to maintain an action. This differentiation, which is made without the justification of a compelling interest, is impermissible under the equal protection clause."
>
> **Jurisdictional Statement**, p. 24.

The Plaintiff alleges that the statute, as interpreted, violates the due process clause because:

> "[U]nreasonably short limitations periods are contrary to due process of law . . . [and] . . . **Jackson's** limitation is so short that it denies a reasonable opportunity to be heard . . ."
>
> Jurisdictional Statement, pp. 21, 22.

The argument which follows will deal with both of these contentions together and demonstrate that the Plaintiff's argument does not present a substantial Federal Constitutional question.

I

A "RIGHT TO BE HEARD" IS NOT AT ISSUE IN THIS CASE; AT ISSUE IS THE SUBSTANTIVE RIGHTS, LIABILITIES, AND IMMUNITIES OF THE RESPECTIVE PARTIES.

Throughout the Plaintiff's **Jurisdictional Statement**, the phrases "denied a reasonable opportunity to be heard," "denial of access to the courts" and denial of an "opportunity to make appearance and present facts relevant to the issues to the tribunal charged with adjudication of the interests involved," are repeated again and again, as if the Plaintiff had actually been denied an opportunity to be heard or had been denied access to the Courts of Tennessee. To the contrary, however, the Plaintiff was heard by the Trial Court, his Declaration was reviewed, for the purposes of the hearing on the demurrer as if everything contained therein was true, and he was heard again by the highest court in the state. The result to which Plaintiff's appeal is addressed is the application of state substantive law to the uncontroverted facts of his case. The outcome would have been no different if the Jury had been seated, Plaintiff's and Defendants' proof been presented, summations made, and a judgment handed down. Reduced to essentials, the Plaintiff's version of the facts simply fails to fall within the legal bounds necessary for the Plaintiff to recover from the particular Defendants which he sued, because the Statute of Limitations had expired as to these particular Defendants when the Plaintiff brought his suit.

The troublesome question of whether Statutes of Limitations are procedural or substantive was analyzed carefully by this Court in **Guaranty Trust Co. v. York**, 326 U.S. 99 (1944). A distinction seemed to be required in that case because the application of the doctrine of **Erie v. Tompkins**, 304 U.S. 64 (1938), was at issue. This Court candidly

noted that the crux of the procedural-substantive issue, for **Erie** purposes at any rate, was whether Statutes of Limitation are outcome determinative.

> "... [T]he question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result . . ."
> 326 U.S. at 109.

This Court went on to hold that Statutes of Limitations, being outcome determinative, were to be treated as substantive law effecting the rights of the parties, regardless of what they are called, and as such, state law was controlling.

In its simplest terms, therefore, the Plaintiff's constitutional attack is not against some arbitrary court rule of procedure which "denied him access to the courts," but to state substantive statutory law which delineates the basic rights, liabilities, and immunities affecting this Plaintiff, these Defendants, and all others similarly situated, and it is on that basis that the Constitutional attack must be weighed and evaluated.

II

NO SUBSTANTIAL FEDERAL CONSTITUTIONAL ISSUE IS PRESENTED BY TENNESSEE'S UTILIZATION OF A DATE OF SALE RELATED STATUTE OF LIMITATIONS IN PRODUCTS LIABILITY CASES.

The Plaintiff alleges an unreasonable "classification" between plaintiffs injured by old products and those injured by new ones, and alleges that the Tennessee Statute

of Limitations is "unreasonably short" and consequently violates his due process rights. In **Binkley v. Dow Chemical Corp.**, Civil No. 4477 and 4478 (U.S. Dist. Ct. for M.D. Tenn. filed September 24, 1971), a copy of which has been set out in the Appendix, the Honorable R. Clure Morton capably pointed out the primary flaw in the Plaintiff's constitutional reasoning:

> "It is submitted that no one has a property or personal right in particular rules of law. A Legislature may eliminate entirely causes of action based on claims of negligent conduct. Therefore, would it not have the power to circumscribe the times within which injuries must occur in order to be actionable in its courts, whether by such a statute of limitation is labeled 'procedural' or 'substantive'?"
>
> Appendix, pp. A-8-A-9.

The District Court went on to refer to three specific instances in which statutory law denied plaintiffs their right to recover where they would otherwise seem to have an actionable claim and where the statute involved was tested on Constitutional grounds before this Honorable Court.

In **Silver v. Silver**, 280 U.S. 117 (1929), where the Constitutional attack was directed against the Connecticut guest passenger statute, this Court wrote:

> "We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object . . . The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute . . . whether there has been a serious increase in the evils of vexatious litigation in

> this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. **Its wisdom is not the concern of the courts**" (Emphasis added).
>
> 280 U.S. at 122, 123.

An injured employee, anxious to escape the bounds of the Texas Workmen's Compensation Act and to proceed against his employer in negligence, attacked the constitutionality of the Texas Workmen's Compensation Act before this Court in **Middleton v. Texas Power and Light Co.**, 249 U.S. 152 (1919). Addressing its attention to the "equal protection" argument asserted, this Court noted:

> "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds".
>
> 249 U.S. at 157.

With respect to the "due process" argument, this Court held:

> "But, as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of respondeat superior, the imposition of liability without fault, and the exemption from liability in spite of fault,—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling

> or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers."
>
> 249 U.S. at 163.

A similar unsuccessful constitutional attack was made against the Federal Labor Employment Act in **Mondou v. New York, N.H. & H.R. Co.**, 223 U.S. 1 (1912).

Not referred to in the opinion in **Binkley v. Dow Chemical Co.**, *supra*, but excellent examples of laws which bar or limit an otherwise good claim, through no fault of the plaintiff, include the laws of governmental immunity, charitable immunity, family immunity, limitation of liability in maritime tort claims, the fellow servant rule, wrongful death cases (prior to wrongful death statutes), limitations on the recovery in wrongful death statutes (as in Colorado, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, South Dakota, Virginia and Wisconsin), and most ominously, no-fault automobile insurance schemes.

The controversy between advocates of "date of sale" related products liability Statutes of Limitations and "date of injury" related statutes has plagued legislatures, the courts, and legal scholars for quite some time. Products liability theory has been in a state of flux for decades, and the Statute of Limitations dilemma has been part of that flux.

Needless to say, the "date of sale" view, although the minority view, has seen widespread application in state jurisdictions. As late as 1965, an annotation on the subject warned plaintiff's attorneys that:

"One traditional rule as to commencement of the running of limitation against causes of action based on negligence is that the statute runs from the time of the negligent act or omission, even though the total damage sustained cannot be ascertained until a later date."

4 ALR 3rd at 830.

The Uniform Commercial Code, as adopted by the National Conference of Commissioners on Uniform State Laws, has a four year "date of sale" related Statute of Limitations:

"Section 2-725. Statute of Limitations in Contracts for Sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

Uniform Commercial Code, Sec. 2-725.

Numerous cases reflect various jurisdiction's application of "date of tortious conduct" or "date of sale" related statutes, applied in a variety of situations, including products liability cases, all with the potential of barring a given claim before the Plaintiff has an opportunity to bring it. Some of these are reflected in the chart below,

but discussion of them seems unnecessary for the purpose of this Motion. Many of the cases which follow, including **Jackson v. General Motors,** *supra*, from Tennessee, have been overruled by legislative enactment or judicial reconsideration, but no effort has been expended to survey the law as it stands now, since the purpose of the chart is merely to demonstrate the wide acceptability of the "date of tortious conduct", "date of sale" or "date of wrongful act" theory.

Arkansas:

Field v. Gazette Pub. Co., 187 Ark. 253, 59 S.W. 2d 19 (1933).

California:

Sonbergh v. MacQuarrie, 112 Cal. App. 2d 771, 247 P.2d 133 (1952).

Connecticut:

Dincher v. Marlin Fire Arms Co., 198 A.2d 821 (2d Cir. 1952);

Vilcinskas v. Sears and Roebuck Co., 144 Conn. 170, 127 A.2d 814 (1956).

Delaware:

L. E. Talcott & Sons, Inc. v. Aurora Corp., 176 F. Supp. 783 (D. Del. 1959).

Florida:

Meyer v. Roth, 189 So.2d 515 (Ct. App., Fla. 1966);

Houston v. Florida-Georgia Television Co., Inc., 192 So.2d 340 (Ct. App., Fla. 1966).

Georgia:

Wellston Co. v. Hodges, 114 Ga. App. 424, 151 S.E.2d 481 (1966).

Iowa:

Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917).

Maryland:

Kitten v. George Washington Cemetery Inc., 231 Md. 337, 180 A.2d 247 (1963).

Nevada:

Palladay v. Bergin, 78 Nev. 441, 375 P.2d 544 (1962).

New Jersey:

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New York:

Outwater v. Miller, 215 N.Y.S.2d 838 (1961);

Swartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 287 N.Y.S.2d 714, 188 N.E.2d 143 Cert. Denied 374 U.S. 808 (1963);

Mendel v. Pittsburg Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

North Carolina:

Thurston Motor Lines v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962);

Land v. Neil Pontiac, Inc., 6 N.C. App. 197 (1969);

Jewell v. Price, 264 N.C. 459, 143 S.E.2d 1 (1965);

Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

Ohio:

Baldridge v. Toombs, 90 Ohio L. Abs. 425, 230 Ohio Op.2d 404, 189 N.E.2d 177 (1962).

Oregon:

Industrial Chrome Plating Co. v. North, 175 Or. 351, 153 P.2d 835 (1944);

Vaughn v. Langmack, 236 Or. 542, 390 P.2d 142 (1964).

Tennessee:

Bodne v. Austin, 156 Tenn. 366, 2 S.W.2d 104 (1928);

Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934);

Goodall Company v. Sartain, 141 F.2d 427 (6th Cir. 1944), Cert. Denied 323 U.S. 709 (1944);

Hall v. DeSaussure, 41 Tenn. App. 572, 297 S.W. 2d 81 (1956);

Jackson v. General Motors, 223 Tenn. 12, 441 S.W. 2d 482 (1968) Cert. Denied 346 U.S. 942 (1969);

Flynn v. Camp, ... Tenn. ..., 470 S.W.2d 347 (1971);

Hargrove v. Newsome, ... Tenn. ..., 470 S.W. 2d 348 (1971).

Texas:

Olson v. Passero, 402 S.W.2d 953 (Ct. App., Texas 1966).

Virginia:

Morgan v. Schlanger, 374 F.2d 235 (4th Cir., 1967);

Owens v. Combustion Engineering, Inc., 279 F. Supp. 257 (E.D. Virg., 1967).

West Virginia:

Picket v. Aglinsky, 110 F.2d 628 (4th Cir. 1940);

Scott v. Rinehart & Dennis Co., 116 W. Va. 319, 180 S.E. 276 (1935).

Only a few of the opinions cited discuss the policy reasons behind a date of tortious conduct related statute, but the policy reason is obvious, and was pointed out concisely in **Vilcinskas v. Sears, Roebuck & Co.**, 144 Conn. 170, 127 A.2d 813 (1956):

> "There is no reason, Constitutional or otherwise, which prevents the legislature from enacting a statute, such as Section 8324, which starts the limitation on actions for negligence running from the date of the act or omission complained of even though at that date no person sustained damage and therefore no cause of action has come into existence . . . If a person is to be sued for negligence, the claim that he is liable should, in fairness, be brought to his attention soon enough after the claimed act of negligence to permit witnesses to be available for his defense. Accordingly, it is in harmony with the theory of statutes of limitations to make the time for bringing the actions start at the time of the occurrence of the alleged negligence and not at the time when the injured person sustained damages. It is consonant with the purpose of protecting defendants against stale claims that the legislature should enact a statute such as Section 8324, which may on occasion bar an action even before the cause of action accrues."
>
> 127 A.2d 816.

The products liability action "strict liability in warranty" (implied warranty without privity) as first described in the landmark **Henningston v. Bloomfield Motors, Inc.**, 32 N.J. 358, 151 A.2d 69 (1961), although not recognized by Tennessee, is equated by the Court of Appeals of New York with strict liability in tort, which Tennessee recognizes but New York does not. The Court of Appeals of New York, regarded as one of the most prestigious and progressive state supreme courts in the

nation, ruled in **Mendel v. Pittsburg Plate Glass Co.**, 25 N.Y.2d 340, 253 N.E.2d 207 (1969), that a date of sale related statute of limitations applied to the products liability action, and went on to explain why they would not change their "date of sale" view even if they thought they had the authority to do so:

> "In conclusion, if the case presented merely an open policy question, which as evidenced from the discussion above we do not believe, we would nevertheless affirm. We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum. Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance. It is our opinion that to guard against the unfounded actions that would be brought many years after a product is manufactured, we must make that presumption conclusive by holding the contract Statute of Limitations applicable to the instant action and limit appellants to their action in negligence."

In **Hargraves v. Brackett Stripping Machine Co.**, 317 F. Supp. 676 (E.D. Tenn., 1970), the Honorable Frank W. Wilson ruled on the Constitutionality of the Tennessee Statute of Limitations in question in this appeal. Judge Wilson, as with Judge Morton in **Binkley v. Dow Chemical Co.**, *supra*, could find no Constitutional objections to the statute's date of sale operation.

> ". . . [T]he relevant test of due process here is basically the test of reasonableness. If in balancing the conflicting interests of the parties reason can be established, or, stated in reverse, if a lack of arbitrariness can be established in the selection of the

date of the wrongful act or the date of the sale of a defective product as the inception date for the running of the statute of limitations in a personal injury action, no constitutional attack on such legislation would lie. Since in every personal injury lawsuit the proof must include evidence of a breach of duty, a wrongful act or a defect in a product, the effect of the lapse of time in the availability of proof of such matters would not be an unreasonable concern for a legislative body to have in mind in the enactment of a statute of limitations. The reasonableness of such a concern becomes the more weighty when it is recognized that in by far the great majority of personal injury cases the wrongful act and the injury follow in close sequence, with no significant lapse of time between the two. Only in a relatively few instances will there be a significant time interval between the two, with product liability cases furnishing the most frequent illustration of such an interval. Even in product liability cases the lapse of time between the wrongful act or the sale of a defective product and the occurrence of the injury is often not a significant one.

When the foregoing matters are weighed against the right of an injured party to seek judicial relief in the exceptional instance where more than a year has elapsed between the wrongful act or the sale of a defective product and the injury, this Court is of the opinion that legislation adopting the date of the wrongful act or the date of the sale of the defective product as the inception date for the running of a statute of limitations cannot be said to be so arbitrary or capricious as to fall under the ban of the Due Process Clause. A statute of limitations must be judged in the light of the broad class of cases to which it applies and if it is reasonable with respect to the class,

it will not be judged unreasonable merely because it is deemed to operate harshly in a particular or exceptional instance. **Lamb v. Powder River Livestock Co.** (C.A. 8) 132 F. 434; **Allen v. Mottley Construction Co.**, 160 Va. 875, 170 S.E. 412. In reaching this conclusion it should be emphasized that the role of the Court is not to pass upon the wisdom or lack of wisdom of the legislation involved. The courts do not sit to review the wisdom of legislation or regulation by public bodies, for these matters address themselves solely to the legislative or regulating body. **United States v. American Union Transport**, 327 U.S. 437, 66 S.Ct. 644, 90 L.Ed. 772 (1945)."

317 F. Supp. at 683.

The Sixth Circuit Court of Appeals subsequently distinguished **Hargraves** from **Jackson v. General Motors**, *supra*, on non-constitutional grounds, and reversed and remanded in an unreported opinion. A motion for summary judgment is again pending in the District Court, based on the more recent decision of the Supreme Court of Tennessee in the case at bar.

Cases such as **Mickle v. Blackman**, 252 So.C. 261, 166 S.E.2d 173 (1969), in which a recovery was had based on a "design defect" in automobile which was fourteen years old when the injuries occurred, and **Hargraves v. Brackett Stripping Machine Co., Inc.**, *supra*, in which a recovery is being sought against the manufacturer of a "defective" folding machine which was manufactured and sold new to a Massachusetts factory forty years ago represent two cases which demonstrate the gross injustice of a date of injury related Statute of Limitations in products liability actions.

If this Court were to assume the responsibility for drafting a particularly enlightened Statute of Limitations

Act for the State of Tennessee, it would seem that the statute which was adopted by the Legislature of Connecticut is particularly well suited to products liability cases, and would serve as an excellent or perhaps model:

> "Conn. Gen. Stat. Ann., Sec. 52-584. **Limitations of action for injury to person or property.** No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within one year from the date when the injury is sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . ."

Neither **T.C.A.** 28-304, as it was before the amendment of 1969, nor **T.C.A.** 28-304 as it exists after the amendment of 1969, reflect great wisdom or care on the part of the Legislature of the State of Tennessee. Nevertheless, prior to the amendment of 1969, the Legislature permitted a "date of wrongful act" statute of limitations to remain in effect, despite the fact that the particular hardship which could occur in some instances was specifically pointed out by the Supreme Court of Tennessee as early as 1934, in **Albert v. Sherman**, 167 Tenn. 133, 67 S.W.2d 140 (1934). The Tennessee statute did not deny anyone any "right to be heard" but merely required that any suit based on a product related injury be brought against a party defendant with some reasonable time related connection with the product in question.

In some future date or age, perhaps the state of industrial technology will develop to the point where all mechanical devices will endure and function to infinity, regardless of the degree of abuse, neglect, wear and tear

or strain which its owners may subject them. Until such time, in the absence of a date of sale related Statute of Limitations, the manufacturer becomes a virtual insurer of the perpetual impregnability of its products, a premise which we all know to be unachievable. It is submitted that nothing in the Constitution of the United States requires a state legislature or a state Supreme Court to create such a burdensome liability to manufacturers, although in its discretion, the legislature may do so, and has done so since 1969 in Tennessee.

Regardless of the pros and cons of a date of sale related Statute of Limitations in products liability cases, or the public policy considerations involved, it seems clear that **T.C.A.** 28-304, as in effect prior to its amendment in 1969, was well within the bounds of legislative discretion recognized by this Court. The contention that as applied to Appellant it denies due process or equal protection of the laws in violation of the Fourteenth Amendment presents no substantial federal question. Appellees' motion to dismiss the appeal should be sustained.

Respectfully submitted

JOHN K. MADDIN, JR.
500 Court Square Building
Nashville, Tennessee 37201
Attorney for Appellee,
Kelley Co., Inc.

JAMES C. SUMMERS
300 Court Square Building
Nashville, Tennessee 37201
Attorney for Appellee
W. L. Newsome

In the United States District Court for the
Middle District of Tennessee
Nashville Division

Jeannette E. Binkley and Charles A. Glidwell vs. Dow Chemical Company and Ethyl Corporation	Civil Actions Nos. 4477, 4478 (Consolidated Cases)
Mrs. Pauline Pace vs. R. H. Buhrke Company, Inc. and United States Forgecraft Corporation	Civil Action No. 4561

MEMORANDUM OPINION

(Filed September 24, 1971)

The three above-styled cases are suit by employees or representatives of employees for injuries and wrongful death brought on the theory that their injuries and deaths were caused by third-party tortfeasors who dealt with the employers of the employees.

In the Pace suit, defects in certain safety belts were alleged. The belts were sold and delivered to the employer on January 25, 1965. The injury to the employee occurred on October 23, 1965, and the suit instituted on October 12, 1966. In the Binkley and Glidwell cases, the allegations were that the third-party tortfeasors furnished the employer defective cleaning compounds. The date of the delivery was May 13, 1965, the employees were injured on May 18, 1965, and their suits were filed on May 18, 1966.

The causes of action are based on common law negligence, express and implied warranties, strict liability, and misrepresentation, fraud and deceit.

Pretrial conferences have been held, motions for summary judgment made, and briefs filed. There is no material dispute as to the facts insofar as they are applicable to the motions for summary judgment filed by the respective defendants. The motions for summary judgment in effect assert that the common law negligence allegations, the action in tort relying upon misrepresentation, fraud and deceit, and strict liability are barred by the one-year statute of limitations, T.C.A. 28-304. As to the allegations of breach of implied and express warranty, it is asserted that the pleadings reflect, and no contention is made to the contrary, that no privity exists between employees and defendants, such privity being a condition precedent to liability under the law of Tennessee.

Implied and Express Warranty

Under the law in Tennessee, by which we are bound under the doctrine of **Erie v. Tompkins**, 304 U.S. 64 (1933), it is well established that privity is a necessary condition precedent to liability in tort, based on allegations of breach of implied and express warranties. The case of **Hargrove v. Newsome**, ... Tenn. ..., ... S.W.2d ... (June 7, 1971), reasserted the necessity for privity. The court in that case stated further that the requirement for privity was reasserted by the legislature of the State of Tennessee by its enactment of T.C.A. 47-2-318. This provision made certain exceptions to the necessity of privity by extending warranties (express and implied) to certain classes of defined persons. Since the plaintiffs in the cases at bar do not fall within the exceptions, this Court, in accordance with the rationale of the previous decisions in the State of Tennessee, and in particular the case of

Hargrove v. Newsome, *supra*, holds that the plaintiffs do not state a cause of action based on their allegations of breach of implied or express warranty.

Statute of Limitations

The plaintiffs recognize that the State of Tennessee in the case of **Hargrove v. Newsome**, *supra*, applied the one-year statute of limitations, T.C.A. 28-304 (as it existed prior to its amendment), to common law negligence and strict liability suits in tort and asserted that the statute of limitations began to run from the date of the negligent act or the time of sale, whichever is applicable. Pertinent language in that decision is as follows:

> "The negligence and strict liability counts were dismissed on authority of **Jackson v. General Motors Corporation**, ... Tenn. ..., 441 S.W.2d 482 (1969). In the supplemental brief plaintiff cites three recent cases arising out of the United States District Courts in Tennessee to support an argument that under the facts of the case at bar **Jackson v. General Motors Corporation**, *supra*, is not applicable. We have carefully considered the federal cases cited and are of the opinion **Jackson v. General Motors Corporation**, *supra*, is applicable to the case at bar. In **Jackson v. General Motors Corporation**, *supra*, we held the applicable statute, T.C.A., § 28-304 (prior to amendment), commences to run at the date of the wrongful act or omission whether the damages occasioned were on the same date or later. In the case at bar the wrongful act or omission was occasioned on the date of the sale (July 8, 1966), and suit was not filed within one year from that date.
>
> "The Court was at the time of its consideration of **Jackson v. General Motors Corporation**, *supra*, and is now, fully aware that the decision in Jackson could

and very likey would cause hardships in certain cases. The decision in **Jackson** was controlled by the decision in **Albert v. Sherman,** 167 Tenn. 133, 67 S.W.2d 140 (1934), and in both of these cases the Court was careful to point out the fact such hardships could result. Even so, during the thirty-four year period between **Albert** to **Jackson** the Legislature did not see fit to change the language of the statute at issue. Since **Jackson,** the Legislature has seen fit to make material changes in the statute." Opinion on Petition to Rehear.

The **Hargrove** case was preceded by the Tennessee Supreme Court's decision in **Bates v. Shapard,** ... Tenn. ..., 461 S.W.2d 946 (December 7, 1970). Again, the Tennessee court, in applying T.C.A. 28-304 (prior to amendment), held that the cause of action for personal injuries to a guest passenger accrued from the date of purchase of the automobile and not the date of injury to the passenger. Thus, nothing else appearing, it seems clear that the plaintiffs' actions were barred by T.C.A. 28-304 prior to the time the suits were filed.

However, the plaintiffs state that T.C.A. 50-914 of the Workmen's Compensation Act creates a new and different statute of limitations which applies only to persons who were injured within the scope of their employment by the tortious acts of third persons. The reverse of this situation is that any person who is injured by the tortious act of a third party, but not while in the scope of his employment, does not receive the benefit of this so-called special statute of limitations.

The language relied upon is contained in the third paragraph of T.C.A. 50-914, which is quoted as follows:

> "Such action against such other person by the injured workman, or those to whom his right of action survives, must be instituted in all cases within one (1)

year from the date of injury. Failure on the part of the injured workman, or those to whom his right of action survives, to bring such action within said one (1) year period shall operate as an assignment to the employer of any cause of action in tort which the workman, or those to whom his right of action survives, may have against any other person for such injury or death, and such employer may enforce same in his own name or in the name of the workman, or those to whom his right of action survives, for such employer's benefit, as such employer's interest may appear, and the employer shall have six (6) months after such assignment within which to commence such suit."

Section 50-914 of the Workmen's Compensation Act of the State of Tennessee has had an interesting legislative history. Prior to 1949 an employee injured while in the scope of his employment as a result of the negligence of a third-party tortfeasor could proceed to judgment against both his employer (insurance carrier) and against the third-party tortfeasor, but could obtain only one satisfaction. Thus, when an injured employee proceeded against his employer and received satisfaction, the third-party tortfeasor escaped responsibility to the injured employee. The statute of limitations on that action was one year as set-forth in T.C.A. 28-304. That action was barred one year from the date of the wrongful act or omission, or the date of the sale of the article which may have caused the injury. **Hargrove v. Newsome**, *supra*.

In order to prevent the third-party tortfeasor from escaping liability for his wrongdoing, that provision of the Workmen's Compensation Act, T.C.A. 50-914, was amended. This amendment did not grant to the injured employee a new cause of action against the third-party wrongdoer. It did, however, create a statutory right of

subrogation in the employer (insurance carrier). In addition, absent a suit by the employee within one year from the date of the injury, it provided for the assignment of the rights of the injured employee (whatever these rights may be) to the employer (insurance carrier) so that the employer could file a direct suit against the third-party tortfeasor to recover any amounts paid out by the employer (insurance carrier). To provide a practical mechanical administrative method, the 1949 amendment stated in effect that if the employee did not bring the suit within said one year, he lost his right to bring it, and the employer had a right to bring suit against the third-party tortfeasor within six months after the termination of the one-year period limiting the right of the employee to sue. It seems clear that the legislature recognized the fact that prior to the 1949 amendment the employee could enter into an agreement with the third-party tortfeasor that the employee would sue his employer, obtain judgment, and wait until the elapse of the statute of limitations as defined by T.C.A. 28-304, and then settle with the third-party tortfeasor, thus denying the employer the right of subrogation. This procedure presupposes that the third-party tortfeasor waived in favor of the injured employee the one-year statute of limitations so as to promulgate this scheme. As a matter of fact, cases have arisen under the Workmen's Compensation Act which indicate that this was a practical scheme. Thus, to prevent the deprivation of rights of the employer and the insurance carrier, but still not to infringe upon or limit the rights of the employee, the 1949 amendment required the employee to bring his personal injury suit against the third-party tortfeasor within one year from the date of the injury, regardless of whether the third-party tortfeasor agreed to extend the T.C.A. 28-304 one-year statute of limitations. The failure to bring said suit within one year would constitute an automatic assignment to the employer or the employ-

ers' insurance carrier of "any cause of action in tort which the workman or those to whom his right of action survives, may have against any other person for such injury or death."

It is clear to this Court that T.C.A. 50-914 did not modify or extend the statute of limitations as defined by T.C.A. 28-304.

The plaintiffs call to the Court's attention an opinion in the case of **Hindman v. City Tank Corporation**, Civil No. 5472 (E.D. Tenn. December 14, 1970), which case reached a contrary conclusion. This Court respectfully disagrees with the conclusion reached in said opinion.

Constitutional Questions

The plaintiffs assert that the application of the rule of **Hargrove v. Newsome**, *supra*, and **Jackson v. General Motors Corporation**, ... Tenn. ..., 441 S.W.2d 482 (1969), cert. denied 346 U.S. 942 (1969), constitutes a retroactive application of a "new" statute of limitations.

The Supreme Court of Tennessee has been careful to point out that the decision of **Jackson v. General Motors Corporation**, *supra*, has been in existence for over thirty-four years. **Hargrove v. Newsome**, *supra*. However difficult it may be to accept, the Supreme Court of Tennessee has stated that **Jackson v. General Motors Corporation**, *supra*, and the subsequent cases are not asserting a new or different interpretation of the statute of limitations (T.C.A. 28-304), but that it is the same statute of limitations and the same interpretation that has been in existence and applied by the Court in excess of thirty-four years. Inferentially, the Supreme Court of Tennessee is saying that the lawyers and the legal authorities have failed to recognize the rule that has been in existence. Certainly this Court is in no position to assert that the Su-

preme Court of Tennessee is in error in this position. **Erie v. Tompkins**, *supra*. Therefore, this Court must hold that **Jackson v. General Motors Corporation**, *supra*, and the succeeding cases have not shortened the time period for the filing of a personal injury suit, nor has it applied a new rule retroactively.

The next question raised is whether a pre-injury time bar is a violation of due process.

The pre-injury time bar, i.e., a statute of limitations running from conduct and not from harm has ancient antecedents in actions on slander. In the case of **Brownlow v. Jones**, 33 Tenn. 170, the Supreme Court refers to the Tennessee limitation, other than the period of the time specified, as founded in the acts of 1715 which in turn came from 21 James I, ch. 16, § 3, quoted in part as "within two years next after the words spoken, and not after."

More recent examples of pre-injury bar have been upheld. Certiorari was refused by the United States Supreme Court in **Jackson v. General Motors Corporation**, *supra*. See **Schwartz v. Heyden Newport Chemical Corporation**, 374 U.S. 808 (1963); **Dincher v. Marlin Firearms Company**, 198 F.2d 821 (2d Cir. 1952).

In the case of **Tioga R.R. Co. v. Blossburg Corning R.R. Co.**, 87 U.S. 137 (1874), the Supreme Court characterized statutes of limitations as follows:

> "Statutes of Limitations are in their nature arbitrary. They rest upon no other foundation than the judgment of the State as to what will promote the interest of its citizens. Each determines such limits and imposes such restraints as it thinks proper."

It is submitted that no one has a property or personal right in particular rules of law. A legislature may elim-

inate entirely causes of action based on claims of negligent conduct. Therefore, would it not have the power to circumscribe the times within which injuries must occur in order to be actionable in its courts, whether by such action a statute of limitation is labeled "procedural" or "substantive"?

As an example, a state statute eliminating a cause of action by a guest passenger against his host driver on grounds of ordinary negligence was upheld by the United States Supreme Court in **Silver v. Silver**, 280 U.S. 117, 122 (1929), saying:

> "As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. Saltonstall v. Saltonstall, 276 U.S. 260, 72 L. ed. 565, 48 Supreme Court Rep. 225. We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, **or the abolition of old ones recognized by the common law**, to attain a permissible legislative object" (Emphasis supplied.)

The elimination of a cause of action against fellow employee through enactment of workmen's compensation laws was upheld in **Middleton v. Texas Power & Light Company**, 249 U.S. 152, 163 (1919), wherein the court said in part:

> "But, as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the

effect to be given to them, the rule of respondeat superior, **the imposition of liability without fault, and the exemption from liability in spite of fault,**—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers." (Emphasis supplied.)

The enactment of FELA legislation produced **Mondou v. New York, N. H. & H. R. Company**, 223 U.S. 1 (1912), wherein the court said, in part:

"First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances'." 223 U.S. 1, 50.

In **Patterson v. Colorado**, 205 U.S. 454, 461 (1907), Justice Holmes said:

"There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it is true, as the plaintiff in error says, that the Supreme Court of Colorado departed

> from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decision, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

It is submitted therefore, if state jurisdiction has power, to create causes of action and to eliminate causes of action then may not such jurisdiction say that as to harm from a product any action within its courts must be maintained if at all, within a specified period. If the jurisdiction has the power to deny a cause of action in its entirety based upon harm from a product, can a period, whether of one year or one hundred years be deemed beyond the discretion of that jurisdiction.

The law recognizes that injury by another standing alone does not give rise to a protected right—witness unavoidable accident and Act of God. Therefore, can a plaintiff claim a Fourteenth Amendment right that all time limitations must run from harm? Do not real property statutes of limitations cut off future interests? Is a potential tort claimant who has not yet been injured to be granted superior status to a potential claimant to an interest in real estate? See 63 Harv. L. Rev. 1179.

Finally, the Supreme Court of Tennessee in **Ford Motor Company v. Lonon**, 217 Tenn. 400, 398 S.W.2d 240 (1966), adopted the rule of strict liability in tort, Restatement of Torts, § 402 A. Since no such cause existed at common law, is it not within the Tennessee court's prerogative to

determine when the cause of action accrues within the meaning of the applicable statute of limitations? Does not the public policy to bring possible litigation to repose justify a calculation of limitation from a time certain rather than have the possibility of litigation continue for the life of the product which in some cases might be 100 years?

For the aforementioned reasons, the Court is required to sustain the Motions for Summary Judgment and dismiss the original plaintiffs' cases.

Furthermore, since the intervenors assert a derivative right to be subrogated in any recovery which the plaintiffs may obtain, the action of the intervenors is dismissed.

Appropriate orders will be entered in these cases.

/s/ L. CLURE MORTON
United States District Judge